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In The Supreme Court of the United States

WILLIAM S. SOWARDS,
Petitioner,
v.
STATE OF OHIO,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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ISSUES PRESENTED

I. Whether unwarned statements obtained in violation of *Miranda* may be used to create a reasonable suspicion underlying a warrantless "probation search."

II. Whether this Court's decision in *United States v. Knights*, 534 U.S. 112, 151 L. Ed. 2d 497, 122 S. Ct. 587 (2001) did not eliminate the "stalking horse" theory - whereby police make use of a suspect's status as a probationer as subterfuge to enter and search a suspect's home - in federal jurisprudence.

III. Whether a valid waiver of the warrant requirement of the Fourth Amendment requires that a consent document signed by the probationer must explicitly state that a search may be conducted "without a warrant."

PARTIES TO THE PROCEEDINGS BELOW

The defendant-appellant below, and petitioner in this Court, is Mr. William S. Sowards; the plaintiff-appellee below, and respondent in this Court, is the State of Ohio.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 10

THE QUESTION PRESENTED BY THIS CASE HAS SUBSTANTIAL CONTINUING IMPORTANCE 13

CONCLUSION 34

TABLE OF AUTHORITIES

Cases

Brady v. United States, (1970),
397 U.S. 742, 748, 90 S.Ct. 1463,
25 L.Ed.2d 747 31

Dickerson v. United States,
530 U.S. 428, 434-435 147
L. Ed. 2d 405, 120 S. Ct. 2326 (2000) 14

Griffin v. Wisconsin, (1987),
483 U.S. 868, 877-878,
107 S.Ct. 3164, 97 L.Ed.2d 709 24

Latta v. Fitzharris, 521 F.2d 246,
249-251 (9th Cir. 1975) 24

Miranda v. Arizona, (1966),
384 U.S. 436, 444, 86 S. Ct. 1602 13

Missouri v. Seibert, (2004),
542 U.S. 600, 124 S.Ct. 2601 ..... 14, 18

Penn. Bd. Of Probation and Parole
v. Scott, 524 U.S. 357, 118 S.Ct 2014 30

Samson v. California, (2006),
547 U.S. 843, 126 S.Ct. 2193,
165 L.Ed.2d 250 11

State v. Cowans, (1999),
87 Ohio St.3d 68, 1999
Ohio 250, 717 N.E.2d 298 11
State v. Farris, (2006),
109 Ohio St.3d 519 17

State v. Jones,(1990),
49 Ohio St.3d 51, 53, 550 N.E.2d 469 32

State v. Sowards, 116 Ohio St. 3d 1508,
2008 Ohio 381 2

State v. Sowards, 2007 Ohio 4863 1

State v. Zeta Chi Fraternity, (1997),
696 A.2d 530, 119 Ed Law Rep. 1019,
cert. Denied, 118 S.Ct. 577,
139 L.Ed.2d 500 (1997) 20

United States v. Goliday,
145 Fed. Appx. 502 21

United States v. Grimes,
225 F.3d 254 (2nd Cir. 2000) 21

United States v. Hill,
967 F.2d 902, 909-910 (3rd Cir. 1992) 24

United States v. Knights,
534 U.S. 112, 151 L. Ed. 2d 497,
122 S. Ct. 587 (2001) 10, 20, 22, 23, 29

United States v. McCarty,
82 F.3d 943 (10th Cir. 1996) 21

United States v. McFarland,
116 F.3d 316 (8th Cir. 1997) 21

United States v. Patane,
(2004), 542 U.S. 630, 639, 124 S.Ct. 2620 14

United States v. Payne,
181 F.3d 781 (6th Cir. 1999) 26

United States v. Penson,
141 Fed. Appx. 406, 410 23

United States v. Stokes,
292 F.3d 964, 967 (9th Cir.),
cert. denied, 537 U.S. 964 (2002) 22, 23

Statutes

U.S. Const. Amend. IV . . . . . *passim*

U.S. Const. Amend. V 3

U.S. Const. Amend. XI 3

O.R.C. 2967.131(B) 20, 27

William S. Sowards respectfully petitions this Honorable Court for a Writ of Certiorari to review the judgment of the Fourth Appellate District of the State of Ohio in the instant matter.

OPINIONS BELOW

This case began in the Court of Common Pleas for Gallia County, Ohio. The trial court overruled Mr. Sowards' motion to suppress and the matter proceeded to trial. The court's denial was not reported, but is reproduced as Appendix A. The denial of the suppression motion and jurors' verdict were appealed to the State of Ohio Court of Appeals for the Fourth Appellate District.

On Appeal, the court agreed that statements from the Petitioner were taken in violation of *Miranda*, but declined to reverse the juror's verdict by concluding the admission of the statements was harmless error. The court's decision is reported electronically as *State v. Sowards*, 2007 Ohio 4863, 2007 Ohio App. LEXIS 4321.

Petitioner sought a discretionary review of the court of appeals' decision in the Supreme Court of

Ohio. Petitioner's request for review was summarily denied without opinion on February 6, 2008 and is reported as *State v. Sowards*, 116 Ohio St. 3d 1508, 2008 Ohio 381.

JURISDICTION

The Supreme Court of Ohio entered its judgment on February 6, 2008. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257. As such, Petitioner properly invokes the jurisdiction of this Honorable Court by filing the instant Petition on or before May 6, 2008.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

> nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is an appeal from a state court's denial of a motion to suppress physical evidence, i.e., marijuana, recovered during a purported "probation search" of Mr. Sowards' residence. Both the trial court and Ohio's Fourth District Court of Appeals improperly analyzed the scope of protection granted by the United States Constitution and the case law interpreting the same in upholding the police and probation department's conduct.

This case arises from a traffic stop of Defendant-Appellant, William S. Sowards, in Gallia County, Ohio, on January 24, 2006. On that day, an Ohio State Highway Patrolman, Trooper Nicholas S. Johnson, spotted a blue Chevrolet pick-up truck touch the center roadway line twice. Trooper Johnson recognized the driver as Defendant-Appellant William S. Sowards and speculated that Defendant-Appellant may be driving under a

suspended license. It was determined that Defendant-Appellant was driving under suspension from an order of the Gallia County Municipal Court. Defendant-Appellant was removed from his vehicle and placed under arrest by the Ohio State Highway Patrol for driving under suspension.

No "*Miranda* rights" were given to the Appellant after his arrest. According to Trooper Johnson's testimony he did not "intend to interrogate" Appellant and failing to Mirandize him. Despite Johnson's testimony, he nonetheless solicited incriminating evidence about "contraband at [the appellant's] house." Johnson interrogated the Defendant-Appellant and asked him questions regarding possible items on his person and at his residence.

Defendant-Appellant Sowards was subsequently searched and found to have marijuana, rolling papers, Xanex tablets, and Lortabs on his person. The Defendant-Appellant, in response to questioning by Trooper Johnson and after he was placed under arrest without the benefit of *Miranda*

warnings, Appellant answered that he also happened to have a small amount of marijuana at his residence.[1]

From the traffic stop, Troopers Johnson and Ball contacted Defendant-Appellant's probation officer, Mike Smith, of the Gallia County Municipal Court Probation Department. Mr. Smith then met Trooper Johnson at the scene. Despite the Defendant-Appellant already having been arrested and in the custody of the Ohio State Highway Patrol, Mr. Sowards was relinquished to Probation Officer Smith for transportation to Defendant-Appellant's residence for a "probationary" search of Defendant-Appellant's residence. The state officers then followed Probation Officer Smith and the Defendant-Appellant to the residence. While en route to Defendant-Appellant's residence to assist Probation Officer Smith with his search, Trooper

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[1]Under Ohio Law, the possession of 100 grams or less of marijuana is a minor misdemeanor. Ohio R.C. 2925.11(C)(3)(a). In addition, the Ohio Revised Code specifically notes that an "[a]rrest of conviction for a minor misdemeanor violation of this section does not constitute a criminal record...." Ohio R.C. 2925.11(D). Therefore, this is not a criminal offense in Ohio

Johnson contacted another Ohio State Trooper, R.J. Jacks, to also assist with the search. In addition to Trooper Jacks, four other law enforcement officers - Sergeants Richard Meadows and Terell Bames of the Ohio State Highway Patrol, and Detectives Chad Wallace and Chris Gill of the Gallia County Sheriffs Office - were also convened at the Defendant-Appellant's residence to assist the probation department in its probationary search. In total, one probation officer and seven law enforcement officials were assembled for a "probationary" search of Defendant-Appellant's residence, based upon supposed information that there was a small amount of marijuana in a can. According to Trooper Jacks, between ten and fifteen law enforcement vehicles were at the Appellant's home by the time the search was concluded.

The "probationary" search of Defendant-Appellant's residence resulted in the seizure of numerous firearms, marijuana, cocaine, and other contraband items. Defendant-Appellant was arrested and finally advised of his *Miranda* warnings by Ohio

State Trooper Jacks. Defendant-Appellant was charged with aggravated drug trafficking and drug paraphernalia, pursuant to §§ 2925.03(C)(3) and 2925.14 of the Ohio Revised Code as well as possession of cocaine and having weapons while under disability. Neither Defendant-Appellant, nor any other individual, legally authorized to do so, gave consent for warrantless searches of Defendant-Appellant's person, property, or residence.

Further, Defendant-Appellant was on probation for driving with a suspended license. There is no evidence that Defendant-Appellant William Sowards, as a probationer, waived his Fourth Amendment rights as a condition of probation to any warrantless searches and seizures.

A Motion to Suppress the Evidence was filed and the trial court heard testimony on July 18, 2006. By journal entry filed August 4, 2006, the trial court denied the motion. A jury trial was conducted October 23, 2006 through October 24, 2006, and a verdict of guilty was returned on Count One of the Indictment, Possession of Drugs in violation of

§2925.11 of the Ohio Revised Code. Sentencing took place on November 29, 2006, and journalized November 30, 2006. Defendant appealed this decision of the trial court to the Court of Appeals of Gallia County, the Fourth Appellate District of the State of Ohio. The Appellate Court ruled on the instant matter on September 17, 2007. The Appellate Court determined the Defendant-Appellant's Fifth Amendment Rights under the United States Constitution were violated but the physical evidence obtained on a subsequent search of Defendant-Appellant's residence should not be suppressed.

The Defendant-Appellant is filed an Appeal to the Supreme Court of Ohio challenging the holding of the State Appellate Court. The appeal was summarily denied on February 6, 2008.

REASONS FOR GRANTING THE WRIT

The issues presented in this Petition naturally grow from this Court's Fourth Amendment jurisprudence, and include one issue addressing the interplay between the Fourth and Fifth Amendments to the United States Constitutions. The issues presented herein are as follows:

I. **Unwarned statements obtained in violation of *Miranda* may not be used to create a reasonable suspicion underlying a "probation search."**

II. **This Court's decision in *United States v. Knights*, 534 U.S. 112, 151 L. Ed. 2d 497, 122 S. Ct. 587 (2001) did not eliminate the "stalking horse" theory - whereby police make use of a suspect's status as a probationer as subterfuge to enter and search a suspect's home - in federal jurisprudence.**

III. In order to constitute a valid waiver of the warrant requirement of the Fourth Amendment, a consent document signed by the probationer must explicitly state that a search may be conducted "without a warrant."

The issues presented in the instant matter are both significant and recurrent. Indeed, this Court has issued several opinions regarding when probation and parole searches are permitted under the Fourth Amendment to the United States. See, *Griffin v. Wisconsin* (1987), 483 U.S. 868, 877-878, 107 S.Ct. 3164, 97 L.Ed.2d 709; *State v. Cowans* (1999), 87 Ohio St.3d 68, 76, 1999 Ohio 250, 717 N.E.2d 298, *Samson v. California* (2006), 547 U.S. 843, 126 S.Ct. 2193, 165 L.Ed.2d 250. Consistent with the Fourth Amendment, a probation search may be initiated on less than probable cause; however, a showing of reasonable suspicion must be made by the government. *Griffin v. Wisconsin, supra.*

This case provides an opportunity for the Court to explain what evidence may be considered by a court in determining the presence of lack thereof of reasonable suspicion for a probation search. Specifically, may a statement that was obtained in violation of *Miranda* provide the reasonable suspicion underpinning a "probation search." Further, this case provides the this Court with an opportunity to draw a distinction between a legitimate "probation search" and those searches which are merely subterfuge for a criminal investigation that lacks probable cause, the so-called "stalking horse" theory.

These constitutional questions and the recurring nature of these questions call-out for the attention of this Honorable Court. Indeed, this case provides a straight-forward fat pattern upon which to further define the scope of exclusionary rule of the Fourth and Fifth Amendment jurisprudence.

THE QUESTIONS PRESENTED BY THIS CASE HAS SUBSTANTIAL CONTINUING IMPORTANCE

I. Unwarned statements obtained in violation of *Miranda* may not be used to create a reasonable suspicion underlying a "probation search."

Substantial and continuing constitutional questions are raised in the following regards. First, the Ohio's Fourth District Court of Appeals failed to properly address the Trial Court's admission of Defendant-Appellant's testimony obtained in violation of the requirements established in *Miranda v. Arizona* (1966), 384 U.S. 436, 444, 86 S. Ct. 1602. While Ohio's Fourth District Court of Appeals properly found the out-of-court statement should have been suppressed, it failed to provide the Appellant the constitutional protection of the Fifth Amendment of the United States Constitution.

In *Miranda*, this Court concluded that the possibility of coercion inherent in custodial

interrogations unacceptably raises the risk that a suspect's privilege against self-incrimination might be violated. See *Dickerson v. United States*, 530 U.S. 428, 434-435 147 L. Ed. 2d 405, 120 S. Ct. 2326 (2000); *Miranda*, 384 U.S., at 467, 16 L. Ed. 2d 694, 86 S. Ct. 1602. To protect against this danger, the *Miranda* rule creates a presumption of coercion, in the absence of specific warnings, that is generally irrebuttable for purposes of the prosecution's case in chief. *United States v. Patane* (2004), 542 U.S. 630, 639, 124 S.Ct. 2620.

In *Patane*, this Court reiterated that "these prophylactic rules (including the *Miranda* rule) necessarily sweep beyond the actual protections of the Self-Incrimination Clause," and that "any further extension of these rules must be justified by its necessity for the protection of the actual right against compelled self-incrimination". 542 U.S. at 639. Appellant maintains that Ohio's Fourth District Court of Appeals failed to properly apply the reasoning of this Court in *United States v. Patane* (2004), 542 U.S. 630, 124 S.Ct. 2620, and *Missouri v.*

Seibert (2004), 542 U.S. 600, 124 S.Ct. 2601, and thus Defendant-Appellant was deprived of the protections required by the Fifth Amendment of the United States Constitution.

In the instant matter, the "probation search" of Mr. Sowers' residence was based heavily on statements obtained from Mr. Sowers without the benefit of his *Miranda* warnings. This is the equivalent of the "question-first" manner of interrogation previously used by authorities in attempting to circumvent *Miranda*. The instant matter and similar cases demand that unwarned statements obtained in violation of *Miranda* may not be used in support of a subsequent "probation search."

Here, Appellant was the subject of a traffic stop by a member of the Ohio State Highway Patrol. Within the first few minutes of the videotaped traffic stop, the Highway Patrol trooper advises Appellant that he is under arrest. Although he is not handcuffed, or placed in the rear of the trooper's car,

he was clearly and unquestionably "under arrest." [2] Appellant was not free to leave. Appellant was not provided his *Miranda* warnings by the trooper before the trooper inquired about whether Appellant had other contraband at his home. Appellant acknowledged that he had a small amount of marijuana at his residence.

Armed with this admission, the trooper contacted Appellant's probation officer and arranged for a "probation search" of Appellant's residence. Because the un-*Mirandized* statements made by Appellant should have been suppressed, as acknowledged by the State Court of Appeals, the alleged contraband seized from Appellant's home should have also been suppressed.

The very genesis of the exclusionary rule is to deter inappropriate police conduct. In a question-first

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[2]The trooper was aware of Appellant's prior motorcycle accident which left him disabled and would prevent him from attempting to run from the trooper in the rural area in which he was stopped. Merely because the Appellant "was allowed to walk about the stop area, use his cell phone, smoke, and generally just 'hang out'" with "no considered length of interrogation" is no reason to disregard this Honorable Court's decision in *Farris*.

scenario in which the *Miranda* warning is withheld and the suspect makes inculpatory statements, the risk is that the warning will mean less when it is eventually recited. To allow un-*Mirandized* statements to form the basis of a probation search on the instant facts will encourage law enforcement to forego giving *Miranda* warnings when arresting a probationer for a minor offense in hopes that the unconstitutionally obtained statements will lead to evidence of a larger crime.

The Supreme Court of Ohio has evaluated a related issue before in the case *State v. Farris* (2006), 109 Ohio St.3d 519. In *Farris*, the accused was not advised of his *Miranda* rights after being stopped by Ohio Highway Patrol officers. The accused, Stephen F. Farris, was not even placed under arrest, but was merely detained by the officer when he made an incriminating statement without the benefit of *Miranda* warnings. In Appellant's situation, he was actually, verbally advised by the Ohio Highway Patrol officer that he was under arrest. The Ohio Highway Patrol trooper then inquired about any

contraband which the Appellant may have at his home. *Farris* holds that physical evidence seized as a result of the accused's statements is inadmissible pursuant to the Self-Incrimination Clause of Section 10, Article I of the Ohio Constitution.

In reaching its conclusion in *Farris*, the Ohio Supreme Court invoked the precedent of this Court, namely *Missouri v. Seibert* (2004), 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643. Specifically, the *Farris* Court reasoned:

> "'The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires. Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second

> stage of interrogation as distinct from the first, unwarned and inadmissible segment." *Seibert*, 542 U.S. at 611-612, 124 S.Ct. 2601, 159 L.Ed.2d 643.
>
> *Seibert* points out that in "question first" scenarios when the circumstances of the given case show that the *Miranda* warning could not reasonably be found effective, the postwarning statements are inadmissible because "the earlier and later statements are realistically seen as parts of a single, unwarned sequence of questioning." Id. at 612, 124 S.Ct. 2601, 159 L.Ed.2d 643, fn. 4. The court clearly rejected the "fruit of the poisonous tree" doctrine as a basis for exclusion. That doctrine holds that "evidence otherwise admissible but discovered as a result of an earlier violation [of Fourth Amendment rights] is excluded as tainted." Id.

Farris, 109 Ohio St. 3d at 523.

The facts of the instant matter are parallel to the "question-first" techniques condemned by this Court in *Seibert*, supra. As such, the same result reached by this Court in *Seibert* and the Ohio

Supreme Court in *Farris* should be reached under the Constitution to United State of America.

II. This Court's decision in *United States v. Knights*, 534 U.S. 112, 151 L. Ed. 2d 497, 122 S. Ct. 587 (2001) did not eliminate the "stalking horse" theory - whereby police make use of a suspect's status as a probationer as subterfuge to enter and search a suspect's home - in federal jurisprudence.

The fact that an individual has the status of a probationer, without more, does not make every search of such individual or his property reasonable. *State v. Zeta Chi Fraternity* (1997), 696 A.2d 530, 119 Ed Law Rep. 1019, cert. Denied, 118 S.Ct. 577, 139 L.Ed.2d 500 (1997). A probation officer is permitted to conduct a warrantless search of a probationer's home if the officer possesses reasonable grounds to believe that the probationer is not abiding by the law or otherwise is not complying with the terms and conditions of probation. Ohio R.C. 2967.131(B);

United States v. Griffin, 483 U.S. 868, 877-78, 107 S.Ct. 3164, 3170-71, 97 L.Ed.2d 709. However, a probation officer is not permitted to act as a "stalking horse" for the police or any law enforcement division. Searches conducted by probation officers who act as "stalking horses" for police, in effect, abuse their authority, and circumventing the warrant requirement of the Fourth Amendment may be found unlawful. *United States v. Goliday,* 145 Fed. Appx. 502, 505 (6th Cir.); *United States v. Grimes*, 225 F.3d 254 (2nd Cir. 2000); *United States v. McFarland*, 116 F.3d 316 (8th Cir. 1997); *United States v. Ooley*, ?F.3d 370 (9th Cir.); *United States v. McCarty*, 82 F.3d 943 (10th Cir. 1996).

In the instant matter, Defendant-Appellant's constitutional rights against illegal search and seizure were violated when the Ohio State Highway Patrol, the Gallia County Sheriffs Office, and the Gallia County Municipal Court Probation Department searched his residence and seized certain items of evidence discovered during a warrantless search of Appellant's premises. The

items seized from Appellant's premises were done so under the auspice of a "probationary search." However, this "probationary search" was conducted in concert with law enforcement personal and performed as an extension of a law enforcement investigation and not as an independent search by the probation department.

The Sixth Circuit recently called into question whether a "stalking horse" theory is cognizable following this Court's decision in *Knights*. Specifically, the Sixth Circuit Court of Appeals noted:

> We note the question whether the "stalking horse" theory is even a cognizable argument following the Supreme Court's decision in *United States v. Knights*, 534 U.S. 112, 151 L. Ed. 2d 497, 122 S. Ct. 587 (2001). In *Knights* the Court stated that in determining the constitutionality of a search of a probationer "there is no basis for examining [the] official purpose" of the search. Id. at 122. As the Ninth Circuit noted in *United States v. Stokes*, 292 F.3d 964, 967 (9th Cir.), cert. denied, 537 U.S. 964 (2002), this holding seems to suggest that prior "cases holding searches of probationers

> invalid on the ground that they were subterfuges for criminal investigations is . . . no longer good law." ***.

United States v. Penson, 141 Fed. Appx. 406, 410 at fn2 (6th Cir. 2006).

Appellant maintains that the "stalking horse" theory is alive and well, *Knights* notwithstanding. Nevertheless, opinions such as *Penson* and *Stokes*, ibid, invite the non-uniform application of federal law. As such, this Honorable Court should accept this case for review.

The legality of a warrantless search pursuant to a probation condition waiving Fourth Amendment rights depends upon a showing that the search was a true probation search and not an investigation search. *United States v. Ooley*, supra. The "probationary search" in theory is to be employed to protect society and determine if the probationer is violating his or her probation terms. If law enforcement rather than probation supervision was the primary purpose of the search, many authorities would indeed hold the search illegal because a probation or parole search may not be used as a

subterfuge for a criminal investigation. *State v. Cowan* (1999), 87 Ohio St.3d 68, 75-76, 717 N.E.2d 298, relying on *Griffin v. Wisconsin*, 483 U.S. 868, *United States v. Hill*, 967 F.2d 902, 909-910 (3rd Cir. 1992); *Latta v. Fitzharris*, 521 F.2d 246, 249-251 (9th Cir. 1975).

Further, while the Fourth Amendment does not forbid pretextual searches, the pretext doctrine still applies to searches not requiring probable cause, such as searches by parole or probation officers. 25 Ohio Jur.3d, Criminal Law § 137 (2005), citing U.S. Const. Amend. IV; *State v. Cowan,* supra.

In the instant matter of Defendant-Appellant, the "probationary search" at issue was a pretext for the true, immediate purpose of the search of gaining additional evidence of other crimes committed by Appellant. Generally, a police officer's focus is not upon ensuring compliance with parole or probation conditions or obtaining evidence for introduction at administrative proceedings, but upon obtaining convictions of those who commit crimes. On the other hand, probation agents, in contrast to police officers,

are not engaged in the often competitive enterprise of ferreting out crime and are to have primary concern of whether their probationers should remain at-liberty on probation or parole. However, the "probationary search" of Appellant's home in the instant matter was not a search by the probation officer to obtain evidence to revoke probation, rather it was to obtain evidence for new criminal charges.

Unlike most cases involving a probationary search of a probationer's residence, the Gallipolis Probation Department here did not have its own independent objective in conducting the search of Defendant-Appellant's residence with the need to determine if the probationer was in violation of his probation. Defendant's probation officer, Mike Smith, already had knowledge that Defendant-Appellant was in violation of his probation. Probation Officer Smith visited the traffic stop scene in which Defendant-Appellant was arrested for driving under suspension and possession of marijuana and other contraband, all which are supposed violations of the Defendant-Appellant's probationary terms. There

was no need to retrieve the alleged small amount of marijuana in a can from Defendant's residence to establish that Defendant-Appellant was in violation of his probation. Further, any subsequent search of the Appellant's entire residence could have been nothing more than an expedition for evidence of other criminal activity of Appellant.

In this case, the immediate and primary objective of the search of Appellant's residence was to generate evidence for law enforcement purposes. Such state officer "assistance" in the search at Defendant-Appellant's residence tainted the "probationary search" of his home. The probation officer did not conceive and execute the search on his own or based on a concern that Defendant-Appellant was possibly in violation of his probation. Instead, seven law enforcement officials were convened at Defendant's residence supposedly based upon the information that there was a small amount of marijuana in a can.

In *United States v. Payne*, 181 F.3d 781 (6th Cir. 1999), three parole officers and three state police

officers, one of which used the situation as an opportunity to access into Defendant's trailer, were involved in the arrest and search of Defendant's residence. Id. at 784. The *Payne* court refused to condone such obnoxious police conduct. It was not approved of then, and it should not be approved now.

Incidentally, the State cannot argue that the evidence would have been inevitably discovered, and, therefore, not subject to suppression. Probation Officer Smith would not have had independent reasonable grounds to search Defendant-Appellant's residence without the illegally obtained statements at the unlawful traffic stop. See O.R.C. 2967.131(B); *United States v. Griffin*, supra. Defendant-Appellant's statements were and are barred as well as fruit of the poisonous tree. Therefore, Defendant-Appellant's probation officer lacked reasonable grounds to suspect that he was in any way not complying with his probationary terms, and therefore, would have lacked the authority to conduct the search.

This Court's approach to the exclusionary rule is powered by the belief that evidence should be

excluded to deter illegal police behavior. The use of a probation officer by police officer to circumvent a warrant requirement is unlawful and should not be upheld. The Gallipolis Probation Department used their ability to search the entire house based on less than probable cause to gather evidence for the state. It could not otherwise search the entire house because of the lack of probable cause. Only exclusion of such evidence can cure the invasion or rights Defendant-Appellant has already suffered.

III. In order to constitute a valid waiver of the warrant requirement of the Fourth Amendment, a consent document signed by the probationer must explicitly state that a search may be conducted "without a warrant."

Defendant-Appellant, William S. Sowards, did not agree, as a condition of probation, to waive his Fourth Amendment protections against warrantless searches and seizures. As such, all evidence obtained as a result of the warrantless intrusions against him

must be suppressed as a corollary to protecting his rights under the Fourth Amendment. U.S. Const. Amend. IV. The State cannot establish that Appellant consented to the warrantless search of his person, vehicle, or residence. First and foremost, there is no evidence that Appellant signed any conditions of probation waiving his Fourth Amendment rights. Therefore, without a written consent to search as a condition of community control sanctions, a warrantless search violates the constitutional rights of the accused. See, *United States v. Knights* (2001), 534 U.S. 112, 122 S.Ct. 587, 151 L.Ed.2d 497 (The consent form approved by this Court explicitly provided for warrantless searches.)

To the extent the State provided a copy of probation conditions during trial, they did not establish that it was signed by the Appellant. Also, there is no evidence that Appellant agreed to be subjected to a warrantless search of his person, vehicle, or residence. There is no language contained within the paperwork of Defendant-Appellant's community control sanctions that provides or

otherwise informs the probationer that he or she is consenting to searches without a warrant.

If the Gallopolis Probation Department wished to have required probationers to submit to warrantless searches, it could and should have stated so within the clear language of the terms. However, it clearly did not. For those cases that found that the probationer waived his or her Fourth Amendment rights and was subject to a warrantless search at any time, the waiver of rights form specifically stated the probationer was subject to a search "without a warrant" *See, e.g. Penn. Bd. Of Probation and Parole v. Scott*, 524 U.S. 357, 118 S.Ct 2014

In the case of Defendant-Appellant, William S. Sowards, there is no such language specifically stating the probationer is waiving his Fourth Amendment right to be free from unreasonable searches and seizures. A commonsense reading of the conditions is not sufficient to provide the Defendant-Appellant with fair notice of what actions should be expected - i.e. warrantless searches. Waivers of constitutional rights must be voluntarily,

knowingly, and intelligently made. This requires an intelligent act done with sufficient awareness of the relevant circumstances and likely consequences. *Brady v. United States* (1970), 397 U.S. 742, 748, 90 S.Ct. 1463, 1469, 25 L.Ed2d 747, 756. To assert that Defendant-Appellant could have read the provided language to have included a condition of warrantless searches is without basis.

Defendant-Appellant cannot be said to have sufficient notice that he was voluntarily, knowingly, and intelligently authorizing a warrantless search of his residence where such language is lacking. Defendant-Appellant did not agree, as a condition of probation, to waive his constitutional right to be protected against warrantless searches and seizures as guaranteed by the Fourth Amendment of the United States Constitution.

Further, any condition of probation for a Defendant-Appellant convicted of driving with a suspended license which requires him to submit to a warrantless search of his residence is unreasonable. Such an intrusion into a residence is not reasonably

related to rehabilitation of the offender ?i.e. his driving practices), has no relationship to the crime of which Defendant-Appellant is connected (driving without a license), and has no reasonable relation to preventing the criminality driving without a license) or otherwise serving the ends of probation. *State v. Jones,* 1990), 49 Ohio St.3d 51, 53, 550 N.E.2d 469. Therefore, a condition of probation for Defendant, convicted of driving with a suspended license, which requires him to submit to a warrantless search of his residence is unreasonable and cannot be upheld, even if, it was consented to. Id.

Finally, where a Defendant-Appellant is said to have waived his rights, the validity of any subsequent search must be decided within the "four corners" of the document authorizing the search; to wit: the rules and regulations signed by the Defendant-Appellant wherein he consents to a search by the Gallipolis Probation Department staff, and not to a search by law enforcement officers. In this case, the probation officer did not conduct a search based upon independent, reasonable suspicion and called in

police officers to assist. Rather, police officers called upon the probation officer to "assist" them in obtaining additional criminal evidence of the Defendant-Appellant. With the urgency the police displayed for calling upon the probation officer to respond to the traffic scene, at least one of the seven officers involved in this matter could have followed the correct procedure and secured a warrant as mandated by the Fourth Amendment of the United States Constitution.

CONCLUSION

That the issues presented herein raise issues not previously addressed by this Court and that current precedent from this Court has been read differently by individual courts is evidence that reasonable jurists differ as to there determinations. Respectfully, this Court should intervene and explicitly answer the question herein presented. Accordingly, the Appellant moves this Honorable Court for a Writ of Certiorari.

Respectfully submitted,

JAMES A. JENKINS, ESQ.
2000 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113

APPENDIX

OHIO SUPREME COURT FILINGS:

Entry,
filed 02/06/08 ..... A1

FOURTH APPELLATE DISTRICT GALLIA COUNTY FILINGS:

Decision and Judgment Entry,
filed 09/17/07 ..... B1 - B32

COURT OF COMMON PLEASE OF GALLIA COUNTY FILINGS:

Judgment Entry,
filed 11/30/06 ..... C1 - C5

Judgment Entry,
filed 10/27/06 ..... D1 - D3

IN THE SUPREME COURT OF OHIO

State of Ohio

Case No. 2007-2016

v.

Entry

William S. Sowards

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Gallia County Court of Appeals; No. 06CA13)

THOMAS J. MOYER
Chief Justice

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
GALLIA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

vs.

WILLIAM S. SOWARDS,

Defendant-Appellant.

Case No. 06CA13

Decision and
Judgment Entry

APPEARANCES:

COUNSEL FOR APPELLANT:

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COUNSEL FOR APPELLEE:

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CRIMINAL APPEAL FROM COMMON PLEAS COURT DATE JOURNALIZED:

ABELE, J.

This is an appeal from a Gallia County Common Pleas Court judgment of conviction and sentence. A jury found William S. Sowards, defendant below and appellant herein, guilty of drug possession in violation of R.C. 2925.11(A). Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE EVIDENCE WHERE DEFENDANT WAS QUESTIONED AFTER ARREST, BUT WITHOUT BEING GIVEN HIS MIRANDA WARNINGS. "

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE DISCOVERED DURING THE WARRANTLESS SEARCH OF APPELLANT'S PREMISES."

In October 2005, appellant began serving a community control sanction imposed for "driving under suspension." The terms of probation required, inter alia, that appellant not violate state law and not possess any illegal drug. Appellant further agreed, as part of the terms of his probation, that he would "submit to a search of [his] person, vehicle or place of residence by any community control officer or law enforcement officer with or without probable cause while on community control."

On January 24, 2006, Trooper Nicholas Johnson observed appellant's vehicle touch the white edge line and the yellow centerline. Trooper Johnson recognized appellant's vehicle from prior contacts and suspected that appellant might be driving with a suspended license. After Trooper Johnson confirmed that appellant did not possess a valid license, he placed him under arrest. As he prepared to conduct a pat-down search, Trooper Johnson first asked appellant if he had marijuana or paraphaenlia on his person. Appellant surrendered a small bag of marijuana. Trooper Johnson also found other drugs

in appellant's pockets. Later, Trooper Johnson asked appellant if he possessed any guns or knives. Trooper Johnson then called for back-up, including appellant's probation officer, to help him conduct a "probation search" at appellant's home. During the search officers found fifty-three (53) pounds of marijuana stored in an outbuilding and forty-nine (49) firearms that appellant stashed at various locations throughout his home. The Gallia County Grand Jury then returned an indictment charging appellant with the possession of marijuana in violation of R.C. 2925.11(A), possession of cocaine in violation of R.C. 2925.11(A), and having weapons while under a disability in violation of R.C. 2923.13(A) (3). Appellant pled not guilty to all offenses.

Subsequently, appellant filed a motion to suppress evidence and argued that (1) Trooper Johnson's initial stop of his vehicle was unlawful, (2) Trooper Johnson failed to inform him of his Miranda rights prior to asking if he possessed anything illegal, and (3) the "probation search" of his home was

unconstitutional. At the motion hearing Trooper Johnson testified about the vehicle stop, the search of appellant's person and the search of appellant's home. Gallipolis Municipal Court Chief Probation Officer Michael Smith also explained the significance of the 2005 community control documents and his role in the "probation search" of appellant's home.

After hearing the evidence and counsels' arguments, the trial court overruled appellant's motion. In so doing, the trial court issued a lengthy and thoughtful decision that thoroughly explained its rationale. The court found sufficient reasonable suspicion for the initial stop of appellant's vehicle in view of Trooper Johnson's personal knowledge of appellant and his knowledge that appellant might not possess a valid driver's license. The Miranda issue was more problematic, however. As the trial court noted, it is uncontroverted that appellant did not receive Miranda warnings prior to Trooper Johnson's question about contraband. Nevertheless, in balancing the totality of the circumstances, the trial court reasoned that this encounter was not a

typical custodial interrogation and that appellant voluntarily disclosed that he possessed marijuana.[1]

The trial court also found no constitutional infirmities with the "probation search" of appellant's home. Provisions of this sort are constitutional, the court noted, and probationers do not enjoy the same liberty interests as non-probationers. Appellant's objection to the absence of language in the community control documents that such a search could be conducted without a warrant also did not sway the court. Noting that the provision explicitly stated that probation searches can be conducted "with or without probable cause," the trial court opined that language concerning a warrant is superfluous because, by definition, a search without probable cause is a warrantless search.

At the conclusion of the trial, the jury found

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[1] The trial court noted that appellant and Trooper Johnson are familiar with one another and that the tone of the arrest and subsequent detention bordered on being friendly. Our review of the videotape of the stop and arrest confirms this view of the events.

appellant guilty of marijuana possession, but not guilty on the cocaine possession and firearm charges. The trial court sentenced appellant to serve eight years in prison. This appeal followed.

I

Because both assignments of error assert that the trial court erred by overruling appellant's motion to suppress evidence, we begin our analysis by delineating our standard of review. It is well-settled that appellate review of a trial court decision on a motion to suppress evidence involves mixed questions of law and fact. See State v. Book, 165 Ohio App.3d 511, 847 N.E.2d 52, 2006-Ohio-1102, at ¶9; State v. Long (1998), 127 Ohio App.3d 328, 332, 713 N.E.2d 1. In deciding a motion to suppress, trial courts assume the role of trier of fact and are in the best position to resolve factual disputes and to evaluate witnesses credibility. State v. Burnside, 100 Ohio St.3d 152, 797 N.E.2d 71, 2003-Ohio-5372, at ¶8. Appellate courts will generally accept a trial court's factual finding if competent and credible evidence supports that finding. State v. Metcalf (1996), 111

Ohio App.3d 142, 145, 675 N.E.2d 1268. However, appellate courts review de novo a trial court's application of the law to those facts. Book, supra at ¶9; State v. Williams (1993), 86 Ohio App.3d 37, 41, 619 N.E.2d 1141. With this standard in mind, we turn to appellant's assignments of error.

II

Appellant's first assignment of error asserts that the trial court erred with respect to the Miranda issue. The evidence adduced at the hearing reveals that Trooper Johnson did not inform appellant of his Miranda rights. Rather, Trooper Robert Jacks read appellant his rights during the search of his home. Appellant argues that his admission to Trooper Johnson's question, asked during the initial stop, about contraband in appellant's possession without first being advised of his Miranda rights, must be suppressed along with all evidence subsequently seized from his home. We disagree with appellant, albeit for reasons different from the trial court's analysis.

Before we turn to the merits of appellant's argument, we first note that this issue would not arise if arrestees are informed of their Miranda rights at the time of arrest. As the late Chief Justice Rehnquist noted, Miranda rights have "become embedded in routine police practice to the point where the warnings have become part of our national culture." See Dickerson v. United States (2000), 530 U.S. 428, 443, 120 S.Ct. 2326, 147 L.Ed.2d 405. An arrestee must be informed of their Miranda rights before questioning can occur. Although no rule requires that an arrestee be read his Miranda immediately after his arrest, seemingly innocuous questioning may later be determined to constitute a custodial interrogation and a violation of the suspect's constitutional guarantees.

In the case at bar, appellant's first assignment of error requires us to answer two pivotal questions. First, did Trooper Johnson's question about contraband, asked prior to advising appellant of his Miranda rights, violate appellant's Fifth Amendment rights? Second, if the failure to advise appellant of

his Miranda rights constitutes a constitutional violation, does that violation require the suppression of the evidence seized at appellant's home? For the following reasons, we answer the first question in the affirmative and the second in the negative.

The Fifth Amendment to the United States Constitution guarantees that no person shall be compelled to be a witness against himself. This safeguard is applicable to the states through the Fourteenth Amendment Due Process Clause, see Carter v. Kentucky (1981), 450 U.S. 288, 305, 101 S.Ct. 1112, 67 L.Ed.2d 241; Malloy v. Hogan (1964), 378 U.S. 1, 8, 84 S.Ct. 1489, 12 L.Ed.2d 653. Also, similar protections are afforded residents of this state under Section 10, Article I, Ohio Constitution. State v. Baker (Nov. 1, 1995), Athens App. No. 94CA1644, unreported.

The United States Supreme Court has determined that prior to a custodial interrogation, a suspect must be warned that he has the right to remain silent, that any statement can be used as evidence against him, and that he has the right to

have an attorney present during questioning. Miranda v. Arizona (1966), 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694. The event that generally triggers a need to give the Miranda warnings is a "custodial interrogation." See Berkemer v. McCarty (1984), 468 U.S. 420, 434, 104 S.Ct. 3138, 82 L.Ed.2d 317; State v. Buchholz (1984), 11 Ohio St.3d 24, 28, 462 N.E.2d 1222. Thus, a formal arrest or some equivalent restraint on a suspect's freedom of movement must have occurred. See State v. Neely, 161 Ohio App.3d 99, 829 N.E.2d 718, 2005-Ohio-2342, at ¶26; State v. Vega-Bonilla (Dec. 23, 1996), Washington App. No. 96CA7.

Typically, courts reviewing Miranda cases are called to determine whether a detention short of formal arrest rises to the level of a "custodial interrogation." In the instant case, however, the officers arrested appellant before he was questioned. The trial court concluded that appellant voluntarily responded to the officer's question and that the custodial setting was less coercive than normal interrogations. We, however, disagree with the trial

court concerning these factors. In State v. Farris, 109 Ohio St.3d 519, 849 N.E.2d 985, 2006-Ohio-3255, at ¶¶7, 36-37, the Ohio Supreme Court held that even voluntary statements made without Miranda warnings are inadmissible. Second, an "interrogation" for purposes of Miranda means any words or actions on the part of the police (other than those normally attendant to arrest and custody) that police should know are reasonably likely to elicit an incriminating response. Rhode Island v. Innis (1980), 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297; State v. Knuckles (1992), 65 Ohio St.3d 494, 496, 605 N.E.2d 54. Here, when the officer asked appellant if he "had anything" on his person, the officer intended to elicit an incriminating response. Finally, Miranda and its progeny provide a bright line rule. Arrestees must be informed of their Miranda rights prior to questioning that is reasonably intended to elicit an incriminating response. To require courts to determine whether the circumstances involved in one custodial interrogation are more, or less, coercive than the circumstances present in other custodial

interrogation settings will cloud the application of the rule.

For these reasons, we respectfully disagree with the trial court's conclusion that Miranda warnings were not necessary under the circumstances in the case sub judice. Thus, appellant's admission concerning the bag of marijuana must be suppressed. The more important question, however, is whether the bag of marijuana and the marijuana seized at appellant's residence must be suppressed. If we looked solely to the federal constitution, the answer is no. The Fifth Amendment self-incrimination clause is not violated by the introduction of nontestimonial evidence obtained as a result of voluntary statements. United States v. Patane (2004), 542 U.S. 630, 637, 124 S.Ct. 2620, 159 L.Ed.2d 667; Missouri v. Seibert (2004), 542 U.S. 600, 619, 124 S.Ct. 2601, 159 L.Ed.2d 643. Thus, Miranda does not mandate the suppression of the physical fruits of an unwarned, but voluntary, statement. Patane, supra at 633-634; also see State

v. Coston, 168 Ohio App.3d 278, 859 N.E.2d 990, 2006-Ohio-3961, at ¶16.

The issue is more complicated, however, under the Ohio Constitution. Although Article I, Section 10, of the Ohio Constitution is analogous to the Fifth Amendment of the United States Constitution, the Ohio Supreme Court held that the Ohio Constitution provides more protection than the Fifth Amendment. Farris, 2006-Ohio-3255, at ¶48. Indeed, the Ohio Supreme Court has held that the Ohio Constitution requires that physical evidence obtained in violation of Miranda must be excluded from evidence. Id. at ¶¶48-49; also see State v. Oliver, 112 Ohio St.3d 447, 860 N.E.2d 1002, 2007-Ohio-372, at ¶17 (Pfeifer, J. Dissenting) .

Appellant argues that under Farris, the marijuana found on his person, as well as the marijuana found at his home, must be suppressed. The trial court reasoned that Farris does not apply because it is factually distinguishable from the case at bar. We agree with the trial court on this point.

After holding that Article I, Section 10 of the Ohio Constitution provides greater protection than the Fifth Amendment, the Ohio Supreme Court considered whether evidence could be admitted under the "automobile exception" to the search warrant requirement. Farris, supra at ¶¶50-52. Although the Farris Court ultimately concluded that the "automobile exception" did not apply, the fact that it engaged in that analysis indicates that physical evidence obtained in violation of Miranda may be admissible under Section 10, Article I, of the Ohio Constitution if it would have been admissible under some other legal principle.

In the case sub judice, we conclude that the contraband found on appellant's person is admissible in evidence under an exception to the Fourth Amendment prohibition against unreasonable searches. The Fourth Amendment protects people from unreasonable governmental searches and seizures. See Delaware v. Prouse (1979), 440 U.S. 648, 662, 99 S.Ct. 1391, 59 L.Ed.2d 660. A search conducted without prior approval by a judge or

magistrate is per se unreasonable with, however, a few specifically established and well-delineated exceptions. Katz v. United States (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576. One exception to the warrant requirement is when a search is conducted incident to an arrest. See State v. Penn (1991), 61 Ohio St.3d 720, 723, 576 N.E.2d 790j State v. Akron Airport Post No. 8975 (1985), 19 Ohio St.3d 49, 51, 482 N.E.2d 606. In Chimel v. California (1969), 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685, the United States Supreme Court explained the need, and outlined the extent, of this exception:

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary

> items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"- construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." (Emphasis added.)

Here, after appellant's arrest Trooper Johnson was constitutionally permitted to conduct a search for evidence on appellant's person. Obviously, the marijuana would have been found during such search.[2]

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[2] Additionally, it is interesting to consider whether appellant's admission to Trooper Johnson, if Trooper Johnson had framed his question differently, could have fallen under the "public safety exception" to the Miranda rule. Law enforcement officers who perform pat-down searches or searches incident to arrest may be confronted with dangerous objects hidden on the suspect's person. Limited questions posed to the suspect on this topic should be permitted. In New York v. Quarles (1984),467 U.S. 649,104 S.Ct. 2626,

81 L.Ed.2d 550, the United States Supreme Court carved out the public safety exception and held that police may question suspects without first informing them of their Miranda rights when a threat to public safety exists. Id. at 655-657. In Quarles, police pursued an armed suspect who ran into a store. When apprehended, the suspect wore an empty shoulder holster. Police asked him what he did with the gun and he motioned that it was behind some boxes. The Court held that his statement is admissible in evidence despite the absence of Miranda warnings because a loaded gun is a greater danger than any concern that the suspect might be coerced into giving a statement against his self-interest. Furthermore, the availability of the "public safety exception" does not depend on the subjective motivations of the officers. Id. at 656; State v. Sneed, 166 Ohio App.3d 492, 851 N.E.2d 532, 2006-Ohio1749, at ¶19. However, an objectively "reasonable concern" for public safety and the need to protect the public must exist. See State v. Prim (1999), 134 Ohio App.3d 142, 154,730 N.E.2d 455; State v. Thompson (Jan. 24, 2001), Jefferson App. Nos. 98JE28 & 98JE29; State v. Jergens (Sep. 3, 1993), Montgomery App. No. 13294.

We concede that no evidence exists in the case sub judice that Trooper Johnson possessed an objectively reasonable concern about public safety. Not only did he and appellant know each other, but a relatively friendly exchange occurred between the men and appellant apparently posed no danger to

officer or to the public. Nevertheless, the question is whether an officer may ask questions to protect the officer's safety.

It does not appear that Ohio courts have fully explored this issue. In State v. House (Sep. 7, 2001), Lake App. No. 2000-L-172 the Eleventh District held that evidence should be suppressed after police asked a suspect if he had anything the police "should know about" and the suspect informed them he had a (marijuana) "bowl." That case provides little guidance here, however, because a vehicle was involved rather than a search of the person (which poses a greater danger to police). The court also concluded that the suspect had been improperly detained. Thus, the court's rejection of the public safety exception is dicta.

Recently, in State v. Flanders, Washington App. No. 06CA16, 2007-Ohio-503, at ¶¶8, 22-24, we affirmed a trial court's suppression of evidence after an officer asked a suspect if "there was anything he should know about." Flanders also dealt with a search of a car rather than a person, however, and we did not explicitly discuss the "public safety exception" to Miranda.

This issue has also been discussed in other jurisdictions, but no bright line rule has been developed. In People v. Cressy (1996), Cal.App.4th 981, a deputy sheriff observed the driver of a stopped car drop a syringe from a window. The officer asked the driver if he had "any other needles" and the driver responded that he had drugs in his pocket. That statement was deemed admissible under the

"public safety exception" despite the absence of danger to the public. The court explained that sticking a hand into a suspect's pocket exposes police to a puncture from a contaminated needle and, consequently, a life-threatening injury. Id. at 987-989. Thus, the "public safety exception" should extend to protect police even if no apparent danger exists to the public at large. The court carefully emphasized the narrowness of its holding, however, and noted that only questions about needles or other potentially dangerous items are permissible. Open-ended questions, however, (for example "What's in your pocket?") are overly broad. Id.

Recently, in People v. Washington (May 17, 2007), California Second App. District No. 8194035, available at www.courtinfo.ca. gov/opinions/nonpub, the court held that a suspect's admission that he possessed "crystal" was admissible after an officer asked the suspect if he had "any guns or weapons or anything I should know about." The court reasoned that the broad question, (do you have "anything I should know about") was asked in the context of guns or other weapons and was thus permissible.

Several federal courts have also applied the "public safety exception" to allow police to inquire on subjects related to their own safety if the questions are narrowly tailored so as not to elicit an incriminating response. The Ninth Circuit held it permissible to ask a suspect if he possesses drugs or needles, United States v. Carrillo (C.A.9 1994), 16 F.3d 1046, 1049-1050, and the Tenth Circuit

With respect to the search of the appellant's home, however, we recognize that a search incident to an arrest will not generally justify the subsequent search of a suspect's home unless the discovery of the evidence on the defendant's person provides a reasonable belief that evidence could be found at the residence. As we discuss fully under appellant's second assignment of error, however, in the case at

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approved asking a suspect if he had anything that "would hurt me?" United States v. Lackey (C.A.1 0 2003),334 F.3d 1224, 1225-1226.

Again, it is interesting to speculate about the possible application of the "public safety exception" in the case sub judice. On one hand, appellant is a known drug user and could have possessed needles, pipes, glass vials, or razor blades in his pocket. On the other hand, Trooper Johnson apparently did not have a specific concern. Also, and more problematic, Trooper Johnson did not ask appellant a simple question regarding dangerous materials on appellant's person but, instead, asked questions specifically about marijuana. We see the benefit of permitting law enforcement officers to ask narrowly tailored questions concerning dangerous materials on the detainee's person that could cause harm to the officer.

bar appellant previously consented to a search of his home as part of his 2005 community control sanctions. Thus, the discovery of the fifty-three pounds of marijuana at appellant's home did not run afoul of appellant's constitutional protections.

In summary, although we disagree with the trial court that Miranda warnings were not required under the facts in this easel we believe that the courtls ruling constitutes harmless error under Crim.R. 52(A). Herel the officer would have nevertheless discovered the marijuana on appellantls person during a search incident to arrest. Further I the marijuana at appellantls home would have been discovered during a search executed pursuant to the community control documents.

For these reasons, we find no merit in the first assignment of error and it is hereby overruled.

III

Appellant's second assignment of error advances a wide array of challenges to the constitutionality of the "probation search" of his residence. We begin with a review of some of the

principles that pertain to a probationer's expectation of privacy against governmental search and seizure.

It is now generally accepted that a probationerls home may be searched without a warrant and on less than probable cause. See Griffin v. Wisconsin (1987)1 483 U.S. 8681 877-8781, 107 S.Ct. 31641 97 L.Ed.2d 709; State v. Cowans (1999), 87 Ohio St.3d 681 761 717 N.E.2d 298. Ohio law permits a probation officer to conduct a warrantless search of a probationerls person or home if an officer has "reasonable grounds" to believe the probationer failed to abide by the law or by the terms of probation. R.C. 2967.131(C). Thus, a search pursuant to this statute complies with the Fourth Amendment if the officer who conducts the search possesses IIreasonable groundsll to believe that the probationer has not complied with the terms of probation. State v. Emch, Summit App. No. 20372, 2002-0hio-3861, at ¶19 State v. Howell (Nov. 17, 1998), Jackson App. No. 97CA824. To establish "reasonable grounds," an officer need not possess the same level of certainty that is necessary to establish "probable cause."

Instead, the officer's information need only establish the Illikelihoodll that contraband will be found in a probationer's home. Howell, supra; Helton v. Ohio Adult Parole Authority (Jun. 26, 2001), Franklin App. No. 00AP-1108.

We now turn to the question of probation searches when a probationer has given prior consent for a search as part of a community control sanction. In 1998, the Ohio Supreme Court held that such searches are constitutional and opined that the only limit on such searches is that they must not be carried out on the basis of "ill will or intent to harass." See State v. Benton (1998), 82 Ohio St.3d 316, 321, 695 N.E.2d 757. Otherwise, home searches may be conducted "any time." Id. at 322. In so holding, the Court apparently rejected the argument that a "reasonable basis" must exist for the search. Id. at 320. Justice Pfeifer, however, dissented in Benton and indicated that recent changes to R.C. 2967.131 limit lithe scope of the decisionll and strike a "reasonable middle ground" between probable cause

searches and completely random searches. Benton, supra at 323 (Pfeifer, J. Dissenting) .

Three years after Benton, the United States Supreme Court addressed this issue in United States v. Knights (2001), 534 U.S. 112, 122 S.Ct. 587, 151 L.Ed.2d 497 and upheld "probation searches" conducted pursuant to a condition of probation, provided that a "reasonable suspicion" exists that evidence of criminal activity can be found in a probationer's See Id. at 120-121.[3] The Court wrote:

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[3] The United States Supreme Court appears to have curtailed the Knights standard when a parolee (rather than a probationer) is involved. See Samson v. California (2006), ____U.S. _____,126 S.Ct. 2193, 165 L.Ed.2d 250. The court explained the variance in treatment, in part, because parolees have fewer expectations of privacy than probationers. Id at 2198. Because appellant is a probationer rather than a parolee, we follow Knights rather than Samson. We also point out that Samson calls into question the proposition that probationers and parolees are treated the same for purposes of Fourth Amendment analysis. See e.g. State v. McCain, 154 Ohio App.3d 380, 797 N.E.2d 527, 2003-Ohio-4890, at ¶7. Also, the Knights court specifically stated that it did not address whether a probationer's advance consent for a warrantless search constitutes a valid waiver of

"We hold that the balance of these considerations requires no more than reasonable suspicion to conduct a search of this probationer's house. The degree of individualized suspicion required of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable. Although the Fourth Amendment ordinarily requires the degree of probability embodied in the term 'probable cause,' a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable. Those interests warrant a lesser than probable-cause standard here. When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable." (Citations omitted.) 534 U.S. at 121.

Fourth Amendment guarantees.

In the case sub judice, the trial court applied a "reasonable grounds" standard and concluded that the marijuana found on appellant's person provided the police and appellant's probation officer reasonable grounds to search his home. A "reasonable suspicion" standard is consistent with both R.C. 2967.131 and case law that interprets that provision.[4]

In the case sub judice, Trooper Johnson testified that appellant possessed marijuana, Xanax tablets and eight Loratabs. This fact raised a "reasonable suspicion" that appellant failed to comply with the terms of his probation and that he may have contraband at his residence.

Appellant argues that the probation search was invalid because the probation documents, which he signed gave and consent for the search his home and person, did not explicitly state that a search could be conducted "without a warrant." We disagree

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[4] Although the trial court looked for "reasonable grounds" to conduct the search rather than reasonable suspicion, the two standards are essentially the same.

with appellant. Although the consent form in Knights explicitly states that a search could be conducted without a warrant, we do not believe that the court imposed a rule that consent forms must always include a recitation of the phrase "without a warrant." Rather, as the trial court aptly noted, the phrase "with or without probable cause" in the 2005 probation documents is "tantamount" to the phrase "with or without a warrant." We cannot conceive of a situation in which a warrant. would issue "without probable cause" and appellant does not suggest one in his brief. Indeed, the Fourth Amendment to the United States Constitution expressly prohibits it.

Appellant further argues that the search was unreasonable because the provision in the 2005 probation documents bore no reasonable relation to rehabilitating him from the prior offense of driving without an operator's license. We are not persuaded. The purpose of probation is to assist in rehabilitating an offender and to protect society from future criminal violations. Knights, supra at 119. Possession of illegal drugs violates the law. Therefore, a

probation condition that forbids the possession of illegal drugs is reasonable, as is a search provision to allow probation officers to ensure that drugs are not located in the probationer's home.

Appellant also objects to the cooperation between Trooper Johnson and his probation officer in performing the probation search of his home. We find nothing improper in that arrangement, nor do we believe that the probation officer was used as a "stalking horse."[5] Possession of marijuana is a crime and violates appellant's 2005 community control sanction. The fact that the probation officer and

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[5] A "stalking horse" refers to a theory in federal jurisprudence whereby police, who do not have a sufficient Fourth Amendment basis to conduct a search, nevertheless make use of the suspect's probation officer as a subterfuge to enter and search the home for contraband. See e.g. United States v. Gollidav (C.A.6 2005), 145 Fed. Appx. 502, 505. The Sixth Circuit Court of Appeals, however, has questioned whether a "stalking horse" theory is cognizable following the Supreme Court's decision in Knights. See United States v. Penson (C.A.6 2006), 141 Fed. Appx. 406, 410, at fn. 2.

Trooper Johnson jointly conducted a search of appellant's residence does not render the search invalid.

To summarize, we agree with the trial court that a probation search is constitutional if "reasonable grounds" or a "reasonable basis" exists to conduct the search. We also agree that the marijuana found on appellant's person provided the police and appellant's probation officer reasonable grounds to search appellant's home. Thus, we hereby overrule appellant's second assignment of error.

Having reviewed the two errors assigned and argued in the briefs, and finding merit in neither of them, we hereby affirm the trial court's judgment

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Gallia County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court

dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Harsha, J. & Kline, J.: Concur in Judgment & Opinion as to Assignment of Error I; Concur in Judgment Only as to Assignment of Error II

For the Court

BY: /s/ Peter B. Abele
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

IN THE COURT OF COMMON PLEAS OF GALLIA COUNTY, OHIO GENERAL DIVISION

State of Ohio, Case No. 06CR52

Plaintiff,

-vs-

William S. Sowards,

Defendant. **JUDGMENT ENTRY**

This matter came before the Court on November 29, 2006 upon the above named Defendant's sentencing hearing pursuant to the Ohio Revised Code, Section 2929.19. Present at the hearing were C. Jeffrey Adkins, Prosecuting Attorney, representing the State of Ohio; James A. Jenkins, representing the Defendant, as was the Defendant who was afforded all rights pursuant to Criminal Rule 32.

The Court has considered the record, any oral statements, any victim impact statement, any plea agreement, any victim approval, and any pre-sentence report prepared, as well as the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and has balanced the seriousness and recidivism factors Ohio Revised Code Section 2929.12.

The Court finds that the Defendant has been found GUILTY as to Count One of the Indictment, Possession of Drugs, a violation of Section. 2925.11 (A) of the Ohio Revised Code and, a felony of the second degree.

For reasons stated on the record, and after consideration of the factors under Ohio Revised Code 2929.12, the Court also finds that prison is consistent with the purposes of the purposes of the Ohio Revised Code Section 2929.11 and the Defendant is not amenable to an available community control sanction.

IT IS THEREFORE, ORDERED that the Defendant be sentenced to the Ohio Department of

Rehabilitation and Correction for a period of eight (8) years for Possession of Drugs, a violation of Section 2925.11 (A) of the Ohio Revised Code and a felony of the second degree.

The Court has further notified the Defendant that post release control is mandatory in this case up to a maximum of three (3) years. The Ohio Adult Parole Board, for a violation of post release control, may send the violator back to prison for up to nine months, with the maximum for repeated violations being 50% of the stated prison term. For a new felony, the violator/offender may be sent back to prison for the remaining period of post release control, or twelve months, whichever is greater, in addition to a prison term for the new felony.

The additional periods of time imposed by another or even this Court because of a felony committed while on post release control in this case or by the Ohio Adult Parole Board for violations of this case while on post release control are a part of the sentence in this case and the Defendant is Ordered to serve.

It is further Ordered that the Defendant pay a mandatory fine in the amount of $7,500.00 pursuant to Ohio Revised Code Section 2929.18.

It is further Ordered that the Defendant's operators license be suspended for five (5) years effective January 24, 2006.

It is further Ordered that the Defendant receive jail time credit in the amount of one (1) day as of November 29, 2006. Defendant is granted credit for future custody days while awaiting transportation to the correctional facility.

Defendant was specifically advised of his right to appeal. Defendant received notice and acknowledgment of rights of appeal. The same was executed by Defendant in open court and shall be placed in the record.

It is further Ordered that an appeal bond be set in the amount of $25,000.00 ten percent secured. Imposition of Defendant's sentence shall be stayed until December 4, 2006 or until bond is posted, whichever occurs first.

It is further Ordered that the Defendant pay all costs of prosecution and any fees permitted pursuant to Ohio Revised Code Section 2929.18 (A) (4).

Any finding herein deemed to be in conflict with State v. Foster, 109 Ohio St. 3d I, is considered to be advisory by this Court.

SO ORDERED.

/s/ D. Dean Evans
D. DEAN EVANS, JUDGE

The Clerk is directed to furnish a copy of the foregoing to C. Jeffrey Adkins, Prosecuting Attorney, Gallia County Courthouse, Gallipolis, Ohio 45631; James A. Jenkins, Attorney for Defendant, 2000 Standard Building, Cleveland, Ohio 44113; Gallia County Sheriff's Department, Attention: Cris Clary, Gallipolis, Ohio 45631; Correctional Reception Center, P.O. Box 300, Orient, Ohio 43146-0300; and Bureau of Sentencing Computation, P.O. Box 450, Orient, Ohio 43146.

IN THE COURT OF COMMON PLEAS OF GALLJA COUNTY, OHIO GENERAL DIVISION

State of Ohio, Case No. 06-CR-52
Plaintiff,

-vs-

William S. Sowards,
Defendant.

JUDGMENT ENTRY

This cause came on for Jury Trial on October 23, 2006. Present were C. Jeffrey Adkins, Prosecuting Attorney and Eric R. Mulford, Assistant Prosecuting Attorney, representing the State of Ohio; and the Defendant, William S. Sowards, represented by James A. Jenkins.

A Jury was sworn and duly impaneled on October 23, 2006, and whereupon a trial began. The Court and Jury heard testimony and received evidence with the Jury receiving the case on October 24, 2006 at approximately 2:00 p.m. At approximately 5:50 p.m. the Court returned the Jury to the courtroom to report its findings.

The jurors having heard all the testimony adduced by the parties made its findings, to-wit: The Jury finds the Defendant **GUILTY** as to Count One of the Indictment, Possession of Drugs, a violation of Section 2925.11 (A) of the Ohio Revised Code. The Jury further finds the Defendant **NOT GUILTY** as to Count Two of the Indictment, Possession of Drugs, a violation of Section 2925.11 (A) of the Ohio Revised Code. The Jury further finds the Defendant NOT GUILTY as to Count Three of the Indictment, Having Weapons under Disability, a violation of Section 2923.13 (A)(3) of the Ohio Revised Code.

The Court accepted said verdicts.

The Court inquired as to whether the Defendant wished the jury polled as to the guilty verdict. The Defendant acknowledged that he did. Each Juror acknowledged their vote. The Court then discharged the jury.

It is therefore, Ordered, Adjudged and Decreed that the Defendant, William S. Sowards, has been found **GUILTY** as to Count One of the Indictment, Possession of Drugs, a violation of

Section 2925.11 (A) of the Ohio Revised Code. The Court therefore enters a finding of **GUILTY**.

It is further Ordered that the Defendant, William S. Sowards, has been found **NOT GUILTY** as to Counts Two and Three of the Indictment. The Court therefore enters a finding of **NOT GUILTY**.

It is further Ordered that a pre-sentence investigation be prepared by the Adult Probation Department and this matter be continued to Wednesday, November 29, 2006 at 10:00 a.m. for sentencing.

Defendant's existing bond is continued.

SO ORDERED.

/s/ D. Dean Evans
D. DEAN EVANS, JUDGE

The Clerk is directed to furnish a copy of the foregoing entry to C. Jeffrey Adkins, Prosecuting Attorney. Gallia County Courthouse, Locust Street, Gallipolis, Ohio 45631; James R. Jenkins, Attorney for Defendant, 2000 Standard Building, Cleveland. Ohio 44113; and Adult Probation Department, Gallia County Courthouse, Locust Street. Gallipolis, Ohio 45631.